



U.S. Department of Justice

Immigration and Naturalization Service

VU

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: WAC-97-198-53236

Office: California Service Center

Date: JAN 11 2000

IN RE: Petitioner:
Beneficiary:

[REDACTED]

Public Copy

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

IN BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

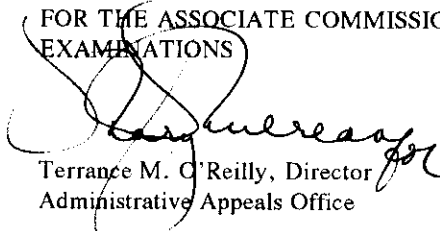
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, an importer and exporter of clothing and apparel, seeks to employ the beneficiary temporarily in the United States as its director of marketing/export and import. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel submits a brief in rebuttal to the director's findings.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization.

The United States petitioner was established in 1996 and states that it is a wholly-owned subsidiary of [REDACTED] located in [REDACTED]. The petitioner seeks to employ the beneficiary for a three-year period at an annual salary of \$32,000.

At issue in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

"Managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to

hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

"Executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In her decision, the director noted that the beneficiary would be employed as a subordinate employee to the company president. The director further noted that although the U.S. entity had been doing business since 1996, it had no support staff to relieve the beneficiary from performing nonqualifying duties.

On appeal, counsel states in part that:

The job held by the beneficiary is that of Vice President who will have direct management control of three different departments, each of which will have an [sic] staff to do the daily work for the department.

The Vice President is the person in charge of the Sales/Marketing Department, the Shipping/Handling Department and the Accounting Department.

The decision makes much of the fact that the company will be hiring independent contractors to do some work for the company. The decision ignores the workers who will be working directly for the company. These contractors consist of a bookkeeping/accounting firm and a transportation company to handling [sic] deliveries and shipments. The decision states that somehow the Vice President will not be doing management or executive level work because these companies are hired to do this work.

The essential function of this company and of this component of the company is to make sales and deliveries; that is [the beneficiary's] responsibility. As a manager of this component, she is not required to supervise anyone as long as she has the authority and the responsibility for making the sales function and the delivery function work and as long as [she] holds a high level position in the company's executive hierarchy.

She also manages the financial operations of the company. This is another component or department of the company that performs an essential function for the company. This part of her job requires her to be responsible for the accounting, accounts payable and receivable, letters of credit, and relations with the company bank, insurance company, and accountant.

In this capacity she acts [as] a manager of the financial functions of the company and provides supervision to the employees of the independent contractor who engage in the day to day work. This is not first line supervision because these employees are not doing the essential business of the company so there is no requirement for them to be "professionals" (although in fact, the accountant and members of his staff do meet this definition).

[The beneficiary] is at the top level of the company staffing hierarchy. The only person above her is the President. She directs the operations of the office and supervises the staff and warehouse work. She is responsible for all the sales work, and all the financial operations of the company.

The record indicates that the U.S. entity was incorporated on December 11, 1996, and the present petition was filed on July 17, 1997. Evidence in the record such as invoices and packing lists

indicate that at the time of the filing of the petition, the U.S. entity had been doing business in the U.S. for more than one year. As such, the U.S. entity does not qualify as "a new office." For the purposes of this proceeding, the beneficiary must have been eligible for the benefit sought at the time of the filing of the petition. Service regulations require a new office to demonstrate viability after the initial one-year period. 8 C.F.R. 214.2(1)(14)(ii). Therefore, the petitioner was obligated to hire its proposed sales/marketing and shipping/handling and subcontractor staff prior to the filing of the petition in order to demonstrate that the beneficiary would be performing in a primarily managerial or executive capacity. The record as presently constituted contains no evidence of staffing other than the president and vice president.

When seeking classification of an alien as a manager based on managing or directing a function, the petitioner is required to establish that the function is essential and the manager is in a high-level position within the organizational hierarchy, or with respect to the function. The record must demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function. The record must further demonstrate that there are qualified employees to perform the function so that the beneficiary is relieved from performing nonqualifying duties. The evidence does not establish that the U.S. entity has grown to a point where the president and vice president are primarily involved with activities of a managerial or executive nature, job titles notwithstanding. Rather, the record indicates that they are involved in performing the operational duties of the U.S. company such as sales. The record does not reflect that the beneficiary functions or will function at a senior level within an organizational hierarchy. For this reason, the petition may not be approved.

Beyond the decision of the director, the record contains insufficient evidence to demonstrate that the beneficiary was employed abroad in a primarily managerial or executive capacity. As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.